



General Certificate of Education

Law 6161

**Unit 4 (LAW4) Criminal Law (Offences
against the Person) or
Contract**

Report on the Examination

2007 examination - June series

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Unit 4 (LAW4): Criminal Law (Offences against the Person) or Contract

Question 1

- (a) The offences involved in this part of the question were a possible assault by George on John arising out of the text message, and possible offences of assault occasioning actual bodily harm, unlawful and malicious infliction of grievous bodily harm, and unlawful and malicious causing of grievous bodily harm under the Offences Against the Person Act 1861, ss47, 20 and 18 respectively, arising out of the incident in the nightclub. Additionally, there was the possibility that John could successfully plead self-defence in connection with his use of the pepper spray. Candidates found no difficulty in identifying the possible assault by George, and most were able to give some explanation of the elements of the offence, though many failed to pay any real attention to *mens rea* and to its application to the facts. Clearly, however, the main factor in differentiating quality of response lay in the treatment of the *actus reus* issues and, in particular, in the requirement for fear of *immediate* violence. Many candidates explored this aspect (and the use of text messages as the medium) by reference to **Constanza, Ireland** and the **Chief Superintendent of Woking Police Station** case. Weaker candidates who remarked upon it often simply dismissed it without argument as not being a problem or, conversely, as being an insurmountable problem. Some candidates appeared to believe that the *actus reus* requires immediate fear of violence rather than fear of immediate violence, whilst others believed that 'imminence' could replace 'immediate' and be stretched to support fear of violence at almost any time in an elastic 'near future'. Many candidates also referred perceptively to **Tuberville v Savage** and to **Read v Coker**, arguing that words in the text could perhaps negate the threat and/or that it could be interpreted as a conditional threat. Some candidates sought to argue for an assault occasioning actual bodily harm using **Chan Fook** and the notion of psychological harm. However, the facts provided little support for this contention. The injury suffered by George in the pepper spray attack was certainly sufficient to amount to actual bodily harm, and could well have been sufficient to qualify as grievous bodily harm, given the area of the body affected and the duration of the injury. In those circumstances, candidates ought to have dealt with both possibilities, though it was perfectly acceptable to concentrate more strongly on one of them. The discussion of the level of injury had to proceed from what have been proposed as the legal criteria and the relevant case-law examples. Admittedly, the criteria are expressed in rather general terms but they are the *legal* criteria. Those expressed in the Joint Charging Standards are not legal criteria and candidates should not begin with them and quote them as if they are, though it is acceptable for candidates to supplement discussion by reference to them as illustrations (this point applies with equal force to answers to question 2(a) and it is worth repeating what has been said above and in previous reports, namely, that if candidates are introduced to the Joint Charging Standards, they should properly understand their purpose and status and should not misrepresent that status in answers). Candidates who selected only the offence under s47 often displayed some confusion. For example, they considered that the loss of eyesight had to be permanent before a more serious offence could have been committed, or they focused on George's fearing immediate personal violence (and so a technical assault) before John actually used the spray, rather than identifying the much more obvious battery involved in actually spraying George. It was rather disappointing to discover that many candidates either did not analyse the meaning of actual bodily harm at all, or did so only by reference to the case of **Miller**. Most candidates understood that the *mens rea* of the offence is simply that of

the constituent assault or battery, though some were confused on this aspect. Many candidates did go on to examine s20 and/or s18 offences, and most could suggest that grievous is interpreted as serious or really serious injury. Often, however, candidates were uncomfortable with the implication that there might be uncertainty about exactly how to classify an injury. As always, a proportion of candidates fell into the error of assuming that a wound is required for grievous bodily harm, and there was also some confusion over the *mens rea* requirements of the s20 offence, or a simple failure to specify what consequence must be intended or foreseen. Yet, on the whole, explanations of the elements of the offences were rather stronger than application, with too few candidates really seeking to consider what the facts suggested John may have known and intended or foreseen about the effects of the pepper spray. Of those candidates who identified a possible defence of self-defence, some wrote very good analyses which established a clear framework in the requirements for necessity to use force and proportion in the force actually used, exploring the issue of pre-emptive strikes by reference to **Bird**, and introducing cases such as **Clegg** and **Martin** on the objective test. Weaker candidates failed to provide the general framework and simply plunged into a heavily fact-orientated analysis, picking out the proportion aspect most frequently. Candidates were often puzzled by the significance of the fact that John was illegally in possession of the pepper spray, and many dismissed the defence out of hand for that reason. The slightly bizarre but perfectly logical position, of course, is that the possession can be an offence but the use in self-defence may be perfectly justifiable – a person illegally in possession of a weapon does not have to spurn the use of the weapon when defending himself from attack, especially a deadly attack! Nor would a pepper spray inevitably be a use of disproportionate force, given the nature of the threat made to John by George. There was some further evidence of confusion in those answers where candidates raised wholly inappropriate defences such as provocation (derived from the text message), duress by threats (because of the gang), and intoxication (because the incident took place in a nightclub).

- (b) The specific instruction in this question was to discuss Henry's possible liability for the murder of Karen. In view of the circumstances in which Henry shot and killed Karen, not only was *prima facie* liability for murder raised but so too were the partial defences of provocation and diminished responsibility. The simple facts were that Henry fired three bullets into the back of the car, one of which struck and killed Karen. On those facts, no dispute about causation could possibly arise, so that lengthy exposition of the causation rules was simply not required. Despite this, many candidates engaged in just such a lengthy explanation, usually concluding it with an acknowledgement that there was no significant causation issue, though some incorrectly asserted that it was raised by the *unintended* killing of Karen. Some candidates strayed still further from the point by detailing other aspects of the *actus reus* of murder such as the nature of a human being. More perceptive candidates dealt very briefly with the *actus reus* and progressed rapidly to the *mens rea*. It seems that Henry's action was directed at John, and there was no specific indication in the facts that he was aware of the presence of anyone else in the car. Thus, though an argument could have been constructed about *mens rea* in relation to other occupants by speculating on what knowledge he might have had, by far the easier route was to consider the likelihood of proving malice aforethought in relation to John as victim, and then to consider whether such malice aforethought could be transferred to the death of Karen. It seems very strongly arguable that the aim of a person who fires bullets into a car is to cause at least serious injury to a person in the car. In this particular instance, the context in which the attack took place leads to the very strong conclusion that Henry's aim was to kill or seriously injure John. This was a classic case in which the malice could be transferred, so that a strong *prima facie* case

for the murder of Karen could be made out. Few candidates were content to treat the issues in this manner, though many wrote answers which included aspects of the above analysis. Frequently, candidates introduced the complications of 'oblique intention', attempting to argue that Henry must have foreseen the virtual certainty of death or serious injury. Though obviously creditworthy, the problem with this line of argument was that a possibility or, perhaps, probability had to be converted into a virtual certainty! However, the more serious defect was that it often led candidates to reveal confusion between implied malice aforethought (intent to cause serious injury) and oblique intention, and between transferred malice and oblique intention. Some candidates misunderstood the nature of the analysis entirely, dismissing the possibility of murder in a cursory manner and moving quickly on to involuntary manslaughter, on the basis that Henry did not intend to kill *Karen*. A surprisingly large number of candidates ignored the possibility of a plea of provocation and dealt only with diminished responsibility. It was certainly arguable that the chances of success would be compromised by the time delay between Henry's first becoming aware of John's attack on George and his eventual firing of the fatal gunshot. Even so, a case such as **Baillie** indicates clearly enough that a loss of self-control may be held to persist over a short period of time which could include 10 minutes. In those circumstances, there was a substantial argument to be made for provocation. Those who did deal with it often made rather less of the time delay aspect than might have been expected, though there were some good accounts of the subjective elements in provocation. Many of these candidates also presented very clear discussion of the objective test, incorporating explanation of the decisions in **AG for Jersey v Holley**, and **James**. However, some candidates dealt with this aspect very briefly and, sometimes, either by reference only to cases such as **Camplin** and **Morhall** (and even **Bedder**) or **Smith**, as if they were totally unaware of more recent developments. Even the stronger candidates often failed to apply the discussion in any convincing manner, and it sometimes seemed that candidates had forgotten that the description of Henry in the first paragraph as having suffered brain damage and being subject to sudden rages and inflicting extreme violence required comment in any context other than diminished responsibility. Almost all candidates dealt with diminished responsibility, though a few combined it or confused it with insanity, and some dealt only with insanity (for which credit was available, though the facts made it difficult to argue credibly that Henry did not understand the nature and quality of his act, or that what he was doing was wrong). On the whole, as in January 2007, answers on this aspect seemed rather more detailed and accomplished than many presented in the past. Most candidates identified the three elements set out in s2 of the Homicide Act 1957, and were able to give a clear account of at least the concept of abnormality of mind, relating this to Henry's rages. Many were also able to explain the nature of the specified causes and to relate their explanation to Henry's brain damage from the accident. Discussion of the requirement that the abnormality of mind must substantially impair mental responsibility for acts or omissions was understandably a little more tentative but was usually sufficiently competent to permit some kind of credible application.

- (c). It was noticeable that a significant number of candidates answered this part of the question first. Though there is nothing wrong in principle with this practice (especially since it is unlikely that discussion of detailed substantive law required for answers to parts (a) and (b) will be anticipated in the more general critical discussion expected in this part), it is important for candidates to distribute their effort evenly across the question parts. There was some evidence that candidates did not always take this into account, in consequence of which answers to either or both of parts (a) and (b) might end up being very truncated. In terms both of option choice and content, answers followed a very similar pattern to those submitted by candidates in January 2007. A

general observation is that rather too many candidates display little real understanding of the criticisms they try to advance. This manifests itself in the superficiality with which arguments are often presented and in the confusion which attends explanation of aspects which certainly have substance.

Murder and Voluntary Manslaughter

There were some very good answers which discussed problematic areas in the law, with criticisms frequently founded on Law Commission Reports. There was frequent reference to the general structure of the homicide offences, and to possibilities for transforming it by adopting a 'degrees of homicide' approach. Related to this were comments on the mandatory life sentence, always most powerful when used to suggest that the law on the partial defences is distorted to extend the scope of liability for forms of manslaughter in which the mandatory sentence is not imposed. Many candidates also explored *actus reus* and *mens rea* issues, with some very good discussions of the general problems of defining intention, and the more specific difficulties with the extended concept of malice aforethought. When candidates made any kind of substantial attempt to explore provocation, some very powerful criticisms emerged. These most often developed arguments comparing the approach to anger and to deep concern as excuses for killing, as well as the familiar alleged contrast between male and female responses. Similarly, there were some interesting and perceptive comments on the general dissatisfaction with the elements of the defence of diminished responsibility.

Involuntary Manslaughter

This was the least favoured option. Most candidates explored deficiencies in the elements of unlawful act and gross negligence manslaughter, with some reference to general overview issues.

Non-fatal Offences

This option was probably favoured by as many candidates as murder and voluntary manslaughter, and elicited some very strong answers. The approach almost always began with comments on the antiquity of the law and its outdated language, moved on to analysis of structural deficiencies, and concluded with examination of aspects of the *actus reus* and *mens rea* of various offences. In the latter context, there were the familiar criticisms of matters such as the definition of a wound as a *kind* of injury, rather than as a *level* of injury, and of the breach of the correspondence principle evident in the *mens rea* which suffices for the various offences. However, there were also some interesting discussions of the possibility of committing the s18 offence without causing serious injury, intending serious injury, or even being aware of the risk that serious injury may occur, provided only that there is an intention to resist or prevent apprehension or detainer. Candidates also often commented on judicial development of the law to adapt the offences to deal with, say, psychiatric injury (as in **Burstow**) or sexually transmitted diseases (as in **Dica** and **Konzani**). Weaker candidates wrote more superficial answers in which they mentioned lots of points briefly, with little explanation and little or no use of authority. Though answers frequently contained some reference to reforms, few used them to cast further light on the criticisms of the current law. Rather, the usual approach was to insert them into the answer as a free-standing element without any comment or link to criticisms.

Question 2

- (a) The injury suffered by Mike during the playful struggle with Les suggested the possibility at least of an offence of assault occasioning actual bodily harm under the Offences Against the Person Act 1861 s47, and also of unlawful and malicious infliction of grievous bodily harm under s20 of that Act. Given the potential severity of the injury (though, clearly, a broken wrist *could* be a relatively minor injury), candidates should certainly have considered both possibilities. On the other hand, the general context of 'rough horseplay' gave little reason to suppose that any serious injury, or, indeed, *any* injury was *intended* by Les. Consequently, it was unnecessary to attempt an argument about s18, though such an argument, probably based on foresight of virtual certainty, would have been credited. In relation to the choice of offence(s) and the detailed discussion of the elements, almost all of the comments made on answers to question 1(a) apply equally to answers to this question, though there was obviously less scope for discussion of technical assault. In particular, many candidates made their choice on the basis of alleged Joint Charging Standards criteria (apparently, broken bones are always grievous bodily harm) and so failed to give thought to exactly what severity of injury might have been comprehended by a broken wrist. Weaker candidates also displayed confusion over the *mens rea* of both the s47 and the s20 offence, as indicated in the comments on the answers to question 1(a). Even those candidates who provided accurate explanations of the *mens rea* were often hesitant in suggesting how it should be applied. Obviously, Les must have intended some physical contact and this intention must have been sufficient for the s47 offence (save for the issue of consent) but proof of his awareness of the risk of *some* injury, which would be the minimum requirement for the s20 offence, would have been more problematic. Many candidates seemed to assume without debate that the fact that Mike was described as being much weaker than the others must have been relevant not only to his fighting prowess but also to, as it were, the brittleness of his bones! Two further factors served to complicate the analysis and were often either omitted entirely or incorporated into answers in a very awkward way. These factors were consent and intoxication. A comprehensive treatment of these factors required some understanding of their interrelationship in the light of the specific facts. However, candidates would have been rewarded very highly just for dealing competently with the effect of each independently. In view of cases such as **Jones**, **Aitken** and **Richardson and Irwin**, consent to the risk of injury in the course of rough horseplay is certainly an exception to the general rule that consent to injury amounting at least to actual bodily harm is not a defence. A surprisingly large number of candidates failed to acknowledge this issue at all. Candidates who did recognise it sometimes did not recognise the exception, and so rejected the possible defence immediately. More perceptive candidates explained both the rule and the exception but perhaps questioned whether Mike had withdrawn any consent when he 'protested'. A small number of candidates understood that, even if consent had been withdrawn, there was still a *mens rea* issue involving Les's beliefs in relation to Mike's consent. Candidates usually identified the intoxication issue but, as always, the treatment of the issue was very variable in quality. A belief seems to persist amongst many candidates that voluntary intoxication can never be a defence, rather than that it is capable of being a defence only to offences of specific intent. Since both offences under discussion are classified as offences of basic intent, candidates could have outlined the rules and applied them by arguing that Les would not be able to assert that he did not foresee a risk of application of force (s47) or infliction of some injury (s20) simply because he was drunk. Additionally, it may have been that any failure to understand that Mike had withdrawn his consent (if such was actually the case) resulted from Les's drunkenness. In view of the difficulty experienced by the courts in dealing with this issue, it was not surprising that even the strongest candidates did not confront it. If Neil could not plead that Les

consented to having his beard shaved off or, at least, that he genuinely believed that Les had so consented, then the shaving off of the beard was certainly a battery and could also amount to the offence of assault occasioning actual bodily harm, on the basis that all the arguments adopted by the Court in **DPP v Smith** to support a conviction for a s47 offence for cutting off a woman's pony tail could apply equally to a beard. Though Les was asleep at the time of the act, this did not necessarily rule out the possibility of a prior consent. However, given Les's apparent attachment to his beard, it is more likely that Neil's strongest line of argument would have been his own belief that Les was consenting, a belief that he could assert without the complications of intoxication. Many candidates were either familiar with the case of **Smith** (though rarely with the detailed arguments used by the Court) or deduced the possibility of actual bodily harm from a more general analysis of the meaning of that term (not a conclusion likely to result from any attempt to use Joint Charging Standards criteria). Even so, candidates who dealt with the incident simply as one of battery still scored high marks if they did so comprehensively. Some candidates, however, sought to treat it as a case of technical assault, seemingly unaware that it would be difficult to prove that the sleeping Les feared immediate personal violence. Despite the strong emphasis in the facts on the general 'horseplay' context, the specific reference to Neil's previous threats, and the suggestion that Neil viewed it all as an acceptable joke, relatively few candidates considered whether consent, or Neil's belief in it, might enable him to avoid liability. A small number of candidates perceived that a very sensible way to approach the consent issues was to reserve treatment of them until the end of the answer, when a general explanation could be provided which would form the framework for specific application to the two different cases.

- (b) In this question, the obvious charge against Neil was one of manslaughter by an unlawful act, with criminal damage (more specifically, arson) being the unlawful act. However, there were two potential breaks in the chain of causation between Neil's unlawful act and the death of Pam. The first was Pam's decision to seek to escape by climbing down the ladder. The second was the provision by Raisa of an unsafe means of escape. Undoubtedly, Neil's conduct was a cause in fact of Pam's death, and it was strongly arguable that it was also a legal cause. Pam's attempted escape could be considered reasonably foreseeable, whilst Raisa's error should not be held to have broken the chain, given the intimate connection of her action with the danger created by Neil (an analogy with the approach to the causal effect of actions of others who seek to save lives, such as doctors, might validly have been drawn here). However, whether or not Raisa's error served to break the chain of causation in Neil's case, it could possibly have given rise to an offence of manslaughter by gross negligence on her own part. Raisa's conduct could have been viewed either as an act or an omission. In either case, it would have to be proved that she was under a duty to Pam, the breach of which caused Pam's death, in circumstances where the breach was so bad that a jury should regard it as criminal and not merely as civil law negligence. Candidates generally had no difficulty in identifying the possibility of unlawful act manslaughter and in selecting criminal damage as the unlawful act. The quality of treatment of this issue varied with the candidates' understanding of the remainder of the requirements, dangerousness and causation. As was suggested in the January 2007 report on a question raising similar issues, candidates usually found no difficulty in asserting that the fire created an objective risk of injury to the person (though some interpreted it as a subjective test), yet weaker candidates were unable to define 'dangerousness' in any significant way. The analysis of causation was often rather formulaic and paid insufficient attention to the precise facts. Thus, general accounts of causation in fact and in law were more in evidence than those which, for example, considered whether Pam's attempted escape was reasonably foreseeable or 'not so daft' that no reasonable person would have

foreseen it, referring to a case such as **Roberts** in support of the argument. It was relatively rare to encounter an answer in which a candidate had managed to combine detailed consideration of the attempted escape aspect with equally detailed consideration of the effect on causation of Raisa's error. Weaker candidates discussed the issue by reference to more general rules on causation without ever analysing the specific aspect raised by the facts. What significance to attribute to Neil's bizarre state of mind caused by his taking of the tablets also seemed to tax the knowledge and understanding of candidates. One candidate suggested that he took them to relieve pain from an injury suffered in the wrestling, though there was no support at all for this in the facts, and it may simply have been a case of mistaken identity. Though Neil's brain functions seemed to have been sufficiently fundamentally impaired for him to be regarded as an automaton, his automatism was self-induced by intoxication, so that the rules on intoxication became the appropriate rules to apply. A relevant case would have been **Lipman**, and Neil's attempt to avoid liability on this basis would have failed because unlawful act manslaughter is a basic intent offence. So candidates who treated the issue as one of involuntary intoxication had generally misunderstood it unless they attempted to make the more sophisticated argument, based on **Hardie**, that the tablets were not intoxicants. Again, though creditworthy, this was not an argument which found much support in the facts. Still less was there a case for insanity, though some candidates tried to make it. Candidates usually recognised that Raisa might be guilty of gross negligence manslaughter and were able to explain at least some of the elements of the offence, often by reference to the case of **Adomako**. In terms of the duty requirement, many candidates took a rather literal approach to the neighbour issue and asserted that Raisa owed a duty to Pam because they were actually 'neighbours' not because Raisa had created that legal status by virtue of her voluntary conduct in seeking to help Pam. Candidates often confidently described, in **Bateman** or **Adomako** terms, the additional requirement that makes the negligence gross, but only the stronger candidates speculated on whether a jury would be more likely to favour the attempt to help than to yield to the temptation to condemn the incompetence displayed in doing so, or *vice versa*. Consequently, many answers failed to take the opportunity to suggest any really convincing application of the final element in liability for gross negligence manslaughter.

- (c) For comments on answers to this question, see the comments on the answers to question 1(c) above.

Question 3

Note: Compared with those answering the Crime questions, relatively few candidates answered the Contract questions. To the extent that generalisations in the comments below might be thought to suggest otherwise, they must be treated with caution.

- (a) This question raised issues concerning formation of contract and the remedies consequent on breach, if any contract could be proved to exist. The first problem to be confronted was the nature of the initial letter sent by the Alpha Wine Club to Brian. Though bearing many of the hallmarks of an offer – for example, it proclaimed itself to be an offer, and it appeared to be addressed directly to Brian – there were other characteristics perhaps more indicative of an invitation to treat. For example, though admittedly circulated to a narrower set of recipients than the general public, the letter may have been little more than a seductive advertisement, not really picking out Brian in any special way but simply seeking to flatter and gain his attention. How many other members, if not all, might find themselves addressed as 'one of our most valued

customers'? If the number of letters sent out significantly exceeded the number of cases of the wine available, as one might suspect to be the case, would not the **Partridge v Crittenden**, rather than the **Carlill v Carbolic Smoke Ball Co**, rationale become relevant? At the very least, candidates should have considered that there was an issue to be debated. Of course, if the letter were interpreted merely as an invitation to treat, then Brian's e-mail would have been an offer and the failure of the Alpha Wine Club to respond would have meant nothing more than that no contract ever came into existence. On the other hand, if the letter was an offer, then Brian's e-mail was certainly an attempt to accept it, and that required analysis of the method that he chose and the legal effect of the e-mail's subsequent fate. If reply by e-mail was ruled out neither explicitly nor implicitly (say, by the fact that the offer was contained in a conventional postal communication), then Brian had every reason to suppose that he had accepted as required. Nevertheless, relying on the analogy with other 'semi-instantaneous' forms of electronic communication, such as telex and fax, the rules to be applied to e-mail on offer and acceptance probably lie somewhere between those for instantaneous and those for non-instantaneous communications (such as by post). The issue would then be whether or not a communication received but not read (or, perhaps more accurately here, 'not dealt with') would satisfy those rules, and whether the fact that there was negligence on the part of the recipient/offeror affected the legal position. If a contract had come into existence, then the failure to supply the wine was a breach for which damages would be the primary remedy (it is unlikely that there would be anything sufficiently unique about this wine to attract a remedy of specific performance), and the measure of which would be the difference between the open market price of the wine and the price that he had agreed to pay. On the whole, candidates adopted a very straightforward interpretation in which the letter was an offer and the only issues then remaining concerned acceptance and the effects of any breach. This meant that the offer/invitation to treat issues passed them by, and many did not even bother to provide any explanation of the distinction, let alone seriously debate its application. To some extent, answers were then 'filled out' by discussion of other aspects of formation, consideration and intention to create legal relations, even though these aspects seemed self-evidently unproblematic. Though such discussion was credited, it could not substitute for comprehensive analysis of the true issues. Discussion of the acceptance aspect was generally sufficiently perceptive to identify the problems but there was a surprising tendency to assume that e-mail communications are governed by the postal rules on acceptance and not by the rules on instantaneous communications (however much there may be doubt about their precise adaptation). Treatment of the remedy was invariably very superficial, often amounting to little more than an assertion that damages could be awarded.

- (b) This question raised issues of breach and of misrepresentation. Even though Brian was already a member of the Wine Club, it seems that this was simply a condition to be eligible to accept an offer to enter into another contract, namely one in connection with the particular wine-tasting. Since a wine-tasting could not take place in the absence of wine, the minimum that the Alpha Wine Club must have been agreeing to supply in return for the £75 was a venue and wines to be tasted. The description of the wines as being from 'exciting' producers might be thought to be nothing more than a trade puff, though that they were new might be of more substance, certainly as a representation, and possibly as a term. Perhaps the suggestion that they would be from a 'range' of such producers was more easily thought of as a representation which might induce a person to enter into the contract, rather than as an objectively verifiable undertaking sufficient to amount to a term. On the other hand, the promise to arrange a draw for a set of free wine glasses was undoubtedly capable of being both a representation and a term. The provision of wine must have been a condition of the contract, whilst the

requirements that they be from a *range* of *new* producers might well be innominate terms, if they were terms at all. The provision as to the draw would almost certainly be merely a warranty. Consequently, there was strong evidence both of breaches of terms and of misrepresentations by the Alpha Wine Club. The remedies available would be those appropriate to breach of condition and of warranty respectively (treating any innominate terms as the one or the other, as appropriate in view of the nature of the breach), and to the classification of any misrepresentation as fraudulent, negligent or wholly innocent. Almost all candidates took their cue from the instruction and attempted to deal both with issues of breach and of misrepresentation, though they were often hesitant about how to impose a framework for explanation on the facts of the scenario. This meant that answers were frequently stronger in abstract terms than in application. Even so, there were some very good explanations of the distinction between conditions and warranties, with the occasional foray into the rather murky waters of innominate terms, and most candidates made the general distinction between the wines and the draw when attempting to classify them as terms. Attributing significance to the distinction in relation to the actual facts was inevitably a little more difficult since little would have been gained by relying on a repudiatory breach. Candidates displayed a general understanding of the meaning of misrepresentation, though rarely dealt in detail with an aspect such as reliance. On the other hand, there were frequently strong explanations of the distinctions between the different types of misrepresentation and candidates generally understood the significance for remedies, even though some confusion appeared at times. Many candidates took the view that any misrepresentation here must have been fraudulent. However, there was nothing specifically in the facts to compel this conclusion and it may have been equally arguable that the Alpha Wine Club had been guilty more of incompetence in its arrangements than of any knowing deceit. In that case, negligent or even wholly innocent misrepresentation might have been just as likely.

- (c) Candidates were given the opportunity to choose one from three options in this question. Previous experience suggested that the most popular choice of option was likely to be offer and acceptance, and so it proved overwhelmingly to be. However, though very small in number, there were perhaps more answers on the intention to create legal relations option this year than on consideration. On the whole, answers did not differ markedly in content from those seen in previous examinations and the comments which follow are substantially those which have been provided in relation to those previous examinations.

Offer and Acceptance

Candidates produced some good answers discussing the problem areas of offer and acceptance. Many candidates made reference to the distinction between offer and invitation to treat, counter offers, revocation and issues arising out of acceptance via different forms of communication. There were some good attempts to set the critical evaluation within a framework of changing technology, as well as discussion by reference to the more traditional 'battle of the forms' notion. Weaker candidates tended to mention many points very briefly, presenting little more than a list of issues, rather than focusing in more detail on a selection of issues.

Consideration

Once again, there were some good answers which presented a strong critique of the current law. These answers tended to emphasise aspects of sufficiency rather than adequacy of consideration, with the discussion exploring past consideration and

performance of existing duties. Nonetheless, adequacy was not totally ignored, and there were answers which revealed a sound knowledge of the extent to which the 'bargain' must have worth.

Intention to create legal relations

Most of the answers on this aspect considered the classification of agreements (as domestic/social or commercial) and the associated presumptions, often using very good authority. Only a very few candidates discussed the issue of why the law might require proof of intention to create legal relations and how the requirement relates to the requirement for proof of consideration. These answers tended to be particularly strong. Some of the answers simply described or explained aspects of the rules without being able to suggest any critical evaluation at all.

Question 4

- (a) This question raised two substantial issues. First, was there a contract between Craig and Edmund in view of the fact that they were brothers-in-law, and that no price had been agreed for the work? Their relationship gave rise to the possibility that there was no intention to create legal relations, a possibility perhaps strengthened by the general air of casualness about the arrangements evident in the failure to discuss any price. The latter fact gave rise to the possibility in itself of uncertainty of terms, though the difficulty might be resolved by resort to a 'reasonable price' and, in any case, the courts do not seem to have been reluctant to assume that a contract exists where the parties behave as if one does, even if some details are missing. The second issue concerned the status of the agreement between Edmund and David. Clearly, all the elements in the formation of a contract appeared to have been satisfied, including an agreed price for the job. However, if Edmund was already under contract to Craig to do the work, then he was promising to do for David, or actually doing, only that which he was already under an obligation to do by virtue of his contract with Craig. This raised the problem of consideration and, in particular, whether consideration is provided where a party does or promises to do something which he is already contractually bound to do by virtue of a contract with a third party. Inevitably, candidates could write very good answers without necessarily being certain as to how these issues would be resolved, though the consideration issue probably admitted more readily of a solution than did the issues raised in the agreement between Craig and Edmund. There were some good answers on the issue of intention to create legal relations and the presumptions in relation to commercial and family agreements. Candidates regularly dealt with **Balfour v Balfour** in this context, with occasional reference to **Simpkins v Pays** and/or **Edwards v Skyways**. However, some candidates wrote in detail about consideration in relation to Craig and concluded erroneously that there was no contract simply because no price had been agreed. Such candidates did not approach the issue from the perspective of certainty of terms. Most candidates discussed formation, and in particular consideration, in relation to the contract between Edmund and David, though some dealt with it as an issue of past consideration, commonly citing **Re McArdle**. However, there were some very good answers that recognised this as concerning a promise to perform existing duties. Even here, though, there was a tendency to rely on the **Stilk v Myrick**, **Hartley v Ponsonby**, and **Williams v Roffey** line of authority relevant to promises to perform existing duties owed to the promisee, rather than to a third person. Some candidates missed the consideration point altogether. This arose because they decided very rapidly that there was no contract between Craig and Edmund for either or both of the reasons discussed above, and having come to such a definite conclusion, it did not occur to them that any further issue regarding a contract between the two could possibly arise. Therefore, the issue of existing duties never surfaced at all.

- (b) This question raised issues of termination of contract by breach and by frustration. When, one week before the agreed start date, Fiona told Edmund that the work could not begin for two months, it is arguable that Fiona committed an anticipatory breach of contract. This depended on the significance to be attributed to the start date. If insufficiently significant, then it was either not a term or not a condition, and Edmund could not have chosen to treat the contract as at an end, though he could have sued for damages if there were a breach. Conversely, he could have chosen to treat the contract as at an end and to sue for damages if the start date was sufficiently important to be regarded as a condition. However, if Edmund chose not to do so but to persist in offering to perform his side of the bargain, then he ran the risk of having to accept that a frustrating event might occur which would bring the contract to an end and render any obligations subject to the provisions of the Law Reform (Frustrated Contracts) Act 1943. Arguably, this is exactly what happened when the conservation area was designated and it became unlawful to make anything other than small changes to Fiona's house. Alternatively, Edmund might have sought to argue that Fiona was at fault in bringing about the frustrating event by delaying the start of the work beyond the time when it became unlawful to perform it. The question succeeded in drawing out some very strong answers on frustration, with many candidates also exploring breach. Most candidates were able to explain the meaning and types of frustration with use of authority, commonly **Krell v Henry** and **Taylor v Caldwell**, and some candidates recognised that perhaps the possibility of doing some work had not rendered the contract completely frustrated. However, few candidates noticed that Fiona might have been sufficiently at fault for the rules on frustration to be excluded. Unfortunately, candidates then struggled to make much sense of the consequences of any frustrating event. Stronger candidates did refer to the Law Reform (Frustrated Contracts) Act 1943, but even they did not fully understand its provisions and how they might be applied to the facts. More commonly, candidates made rather general assertions about whether Fiona was entitled to recover any of the £8000 deposit, and whether she was obliged to make any further payment. Some candidates paid little attention to breach. However, those candidates who did consider the alternative often wrote very good answers distinguishing between conditions, warranties and, occasionally, innominate terms. In some cases, they also dealt very well with the anticipatory breach aspect and were able to consider the relationship between such breach and a possible subsequent frustrating event.
- (c) For comments on answers to this question, see the comments on the answers to question 3(c) above.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the [Results statistics](#) page of the AQA Website.